No. 80-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANDERSON BROS. FORD AND FORD MOTOR CREDIT COMPANY,

Petitioners,

v.

OLGA VALENCIA AND MIGUEL GONZALEZ,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE CONSUMER BANKERS ASSOCIATION, GENERAL MOTORS ACCEPTANCE CORPORATION AND THE NATIONAL CONSUMER FINANCE ASSOCIATION AS *AMICI CURIAE*

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The Consumer Bankers Association, General Motors Acceptance Corporation and the National Consumer Finance Association (collectively "*Amici*") respectfully submit this Brief as *amici curiae* in support of the Petitioners, filed upon the written consent of all parties in accordance with Rule 36.2 of the Rules of this Court.

INTEREST OF *AMICI CURIAE*

The Consumer Bankers Association ("CBA"), a non-profit organization organized in 1919, provides a voice for the consumer banking industry. The membership of CBA has

grown to more than 340 commercial banks, each actively engaged in extending consumer credit. Its members hold obligations representing over $72 billion of consumer credit, more than 55 percent of all consumer credit extended by commercial banks.

General Motors Acceptance Corporation ("GMAC") is a credit finance institution that purchases retail installment contracts from automobile dealers. It has 352 branch offices in the United States and Canada, from which it provides financing services to over 18,200 General Motors dealers. GMAC holds more than 4,000,000 retail installment contracts, representing over $21 billion in outstanding credit.

The National Consumer Finance Association ("NCFA") is the nation's largest trade association serving the consumer finance industry. Founded in 1916, it represents nearly 800 consumer finance and industrial banking companies operating more than 17,000 offices across the United States. Its members hold about 90 percent of the $70 billion in outstanding consumer credit of the industry.

GMAC and the members of CBA and NCFA conduct business in every state in the nation, a substantial portion of which involves making consumer loans and acquiring retail installment sales contracts that are subject to the Federal Truth in Lending Act ("TILA"). TILA requires comprehensive credit cost disclosures in connection with every consumer credit transaction. The contract before the Court, which contains a clause that is alleged to be in violation of TILA, is standard throughout the consumer finance industry. If the decision below is sustained, it will affect virtually every contract held by GMAC and the members of CBA and NCFA.

The instant case merely illustrates the problems faced by consumer credit grantors. The proper technical disclosure of "security interests" and, specifically, unearned insurance premiums typifies the detail under TILA with which creditors must attempt to deal. *Amici* are vitally interested in having the Court reiterate the proper role of the Federal Reserve Board and thereby end the waste of judicial and economic resources caused by inconsistent judicial interpretations of hyper-technical requirements of TILA.

SUMMARY OF ARGUMENT

The issue before the Court is whether TILA requires creditors to disclose "clearly and conspicuously" as a "security interest" the assignment of returned or unearned property damage insurance premiums that relate to insurance on the collateral that secures a credit transaction.

Neither the express language of TILA nor that of implementing Regulation Z requires that this universal contract provision be disclosed as a security interest. The purpose of TILA is to assist consumers in making informed credit decisions by providing them with meaningful and comparable disclosures of *important* credit information. The decision below effectively holds that "unearned insurance premiums on property damage insurance" constitutes such critical information. That determination is not supported by TILA either literally or as intended by Congress.

Moreover, the decision under review is directly contrary to the informed judgment of the Federal Reserve Board, the agency charged with implementing and administering TILA. That judgment, reflected through Unofficial Staff Interpretations, was that *State* law decides whether a security interest exists. Here, the finding by the District Court was that there is no security interest under applicable State law. Thus, no disclosure is required.

This case involves a claimed TILA violation that plainly caused no loss or injury. If the Court determines that a violation has occurred, this case is uniquely appropriate for the exercise of judicial discretion in giving a ruling adverse to the creditor only prospective effect. TILA is not designed to provide debtors with compensation for damages suffered in consumer credit transactions, except under a rarely used provision not being invoked here. Rather, it is a statute that imposes penalties, enforced by private litigation, on creditors who do not provide with technical precision all of the disclosures ultimately held to be required. In most cases, as in this case, the debtor has not been injured by the TILA violations alleged. Equally important, consumer credit transactions

involve the use of preprinted, widely distributed forms. As a result, the cost of retooling to meet every claimed or conjured disclosure requirement is substantial, yet the potential for enormous liability in class actions is obvious if disclosure is ultimately held lacking and that decision is given retrospective effect.

Thus, by the very nature of TILA, retrospective application of a decision that is adverse to a creditor on a close question of law has the potential for punitive effects on creditors and windfall gains to debtors who are not injured in any way. It is particularly appropriate in such a case for the Court to limit its decision to prospective effect.

ARGUMENT

I. INTRODUCTION

TILA[1] was adopted to allow consumers to shop for credit on the basis of uniform, and therefore comparable, credit cost information.[2] It applies to virtually all extensions of credit for personal, family or household purposes. TILA, as implemented through Regulation Z[3] and interpretations issued by the Federal Reserve Board and its staff, applies to each of literally millions of consumer credit transactions undertaken every year.

TILA creates specific disclosure requirements that are discharged through the use of complex and often lengthy disclosure and contract forms. These forms contain both preprinted disclosure information and blanks to be filled in later to reflect dollar amounts, repayment term, and other transaction-specific information. Because of the desirability and necessity of a high-volume, low-cost credit documentation system, the need for legal review, and the potential for human errors in form completion, creditors maximize preprinted in-

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[1] Truth in Lending Act, Pub. L. No. 90-321, Title I, 82 Stat. 146 (1968), as amended, 15 U.S.C. §1601 *et seq.* (1974 & Supp. 1980).

[2] 15 U.S.C. §1601.

[3] 12 C.F.R. Part 226 (1980) (designated as "Regulation Z").

formation. As a result of these factors, lending forms are often "integrated" forms that contain both information required under TILA and contract terms and conditions that are required or permitted under State statutory or common law.[4] Importantly, most TILA cases, including this one, deal not with the question of information being made available to the consumer, but with whether the information has been disclosed in a technically precise manner, including conformity with type size and location requirements.[5]

Two basic types of credit transactions are subject to TILA, each reflected by its own type of form: (1) lending transactions in which a consumer goes directly to a creditor, executes a direct loan note, and obtains money from that creditor; and (2) retail sales in which a consumer purchases goods and services on credit from a retailer, often memorialized by retail installment sales contracts, which are normally assigned at a discount to a financing entity.

In both cases, forms are prepared either by the lender or by potential assignees of sales contracts and made available through an extensive distribution network. Often lender forms are distributed to geographically diverse branches or offices. Retail installment sales contracts incorporating required disclosures are prepared by potential contract assignees and distributed to retail sellers. These assignees provide forms to assure that the contracts they eventually hold are valid and meet all applicable Federal and State requirements. Due to the

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[4] Subject to certain limitations, additional information or explanations may be supplied with required disclosures. 12 C.F.R. §226.6(c).

[5] The disposition of unearned insurance premiums is fully described in the contract involved here in the same type size and style as the rest of the contract. *See* Illinois Automobile Retail Installment Contract dated September 30, 1977, *Petition For A Writ of Certiorari* [following A-58]. It appears, however, on the reverse side of the contract and thus, if a security interest, contravenes technical requirements mandating that prescribed disclosures appear on only one side of a page. *See* 12 C.F.R. §226.8(a); *Lauletta* v. *Valley Buick, Inc.*, 421 F.Supp. 1036, 1040 (W.D. Pa. 1976); FRB Public Information Letter Nos. 130, 132, 150, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶¶ 30,478; 30,479; 30,492 (October 7, 1969; October 7, 1969; October 14, 1969).

need for certainty,[6] assignees, with carefully scrutinized exceptions, generally will accept the assignment only of their own contracts. Thus, the retail sales community obtains forms almost exclusively from potential assignees.

Since these forms reflect both Federal and State law requirements, it is virtually always necessary to prepare forms on a State-by-State basis. Due to the combination of the number of transactions involved, the use of detailed disclosure forms, and the widespread distribution system for forms, *any* change in the law that affects a consumer credit form, including a disclosure change, triggers a substantial changeover process.[7] The extensive process involved must be undertaken with respect to *each* change in the law and *each* affected form, which in many cases may involve tens of different forms for every creditor.

It is this cumbersome machinery through which TILA requirements must be discharged and technical changes implemented. The nature of the process creates substantial difficulties for creditors faced with virtually instant changes in the law in light of the enforcement approach reflected in TILA. The TILA enforcement mechanism gives individuals the right to recover a statutory penalty for any violation in an amount equal to two times the total finance charge of the transaction, but not less than $100 nor more than $1000.[8] In addition, the law permits class actions in which consumers can

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[6] Subsequent assignees are liable for violations that are apparent on the face of an assigned instrument. 15 U.S.C. §1614.

[7] That process includes legal analysis; review of the suitability of the change for personnel who complete the form; printing new forms; physical distribution of the forms often to a number of different branches, offices and dealerships (accompanied by retrieving and destroying obsolete forms); personnel retraining necessitated by the change; and, if it affects certain information, the reprogramming of computer terminals used by many creditors to complete consumer credit forms.

[8] 15 U.S.C. §1640(a)(2)(A). Actual damages are also permitted under TILA, 15 U.S.C. §1640(a)(1); however, on the basis of extensive experience with TILA litigation, *Amici* respectfully submit that this provision is very rarely used, since, as here, such damages are virtually never incurred.

recover up to the lesser of $500,000 or 1% of the creditor's net worth,[9] without any limit on the number or size of the class and, conceivably, on the number of class actions that might be asserted. Perhaps more important, TILA also allows consumers to recover their attorneys' fees and costs.[10] As a result, for any conceivable technical violation — wholly in the absence of harm or injury — a consumer and his or her lawyer may recover the penal sum permitted and fees for bringing the action.[11] This enforcement mechanism, driven by economic incentives, creates concerns based on more than abstract theories; in fact in the last nine years, more than 15,000 lawsuits have been initiated in Federal courts alone,[12] and no reliable statistics are available to indicate the number of actions brought in State court, or brought as counterclaims to collection actions in State or Federal courts, or raised in the course of bankruptcy proceedings. In short, the amount of litigation has been enormous and the costs to both creditors and the judicial system have been staggering.

The case at bar offers an example of the cumulative effect of the foregoing factors. The claimed violation is a failure to include the requested disclosure on the face of the contract, although it appears on the reverse side. At the time relevant to this proceeding, this alleged defect was un-

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[9] 15 U.S.C. §1640(a)(2)(B).

[10] 15 U.S.C. §1640(a)(3).

[11] Courts have held that they have no discretion regarding the imposition of civil liability if they find a violation of TILA, no matter how technical. *See, e.g., Grant v. Imperial Motors*, 539 F.2d 506, 510 (5th Cir. 1976).

[12] 1975 *Annual Report of the Director*, Administrative Office of the United States Courts, Table 32, at 221; 1980 *Annual Report of the Director*, Administrative Office of the United States Courts, Table 27, at 71. From 1972 through June 30, 1980, precisely 15,918 cases were brought in the TILA reporting category. The TILA category also includes some odometer fraud cases, under the Motor Vehicle Information and Cost Savings Act, and cases filed under the Interstate Land Sales Full Disclosure Act. Based on *Amici* experience in this area and informal conversations with staff at the Administrative Office, virtually all cases in this reporting category involve TILA claims.

doubtedly found in virtually every secured consumer credit contract in the country.[13] Although some creditors have started to respond to what *may* be a change in law, changes have not been made in one circuit that has held disclosure is not required,[14] in the circuits that have not considered this question and by smaller creditors or others unable to react quickly. It seems likely that the vast majority of contracts continue to have the clause and that, if covered by TILA, it is not displayed in a technically correct way. An instant change requiring "disclosure" of this clause, would adversely affect literally millions of outstanding consumer credit contracts. These contracts, executed for terms as short as six months and as long as 30 years, present continuing sources of creditor exposure[15] for what is at the very best a questionable and artificial characterization of a trivial interest.

In short, if the practice identified by Respondents is a violation, it is one shared by millions of forms used within the past year and still in use in consumer transactions across the nation. Respondents' contentions, if accepted, would im-

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[13] Respondents have cited a single contract roughly contemporaneous with the one involved in this case that discloses unearned insurance premiums as security interests. *Brief In Opposition To Petition For A Writ Of Certiorari* at 8. From that one contract, Respondents infer that creditors were "routinely disclosing these matters." *Id.* On the basis of extensive experience and direct knowledge of the industry, *Amici* respectfully submit that the single contract cited demonstrates an exception to what was and has been virtually uniform industry practice of not treating interests in unearned premiums as "security interests" or disclosing them as such.

[14] *See James* v. *Ford Motor Credit Co.*, Civ. No. 78-1806 (10th Cir. June 24, 1980), *reh. denied* (10th Cir. July 21, 1980). This case is reproduced in the *Petition For A Writ Of Certiorari* at A-48.

[15] Debtors generally may assert TILA violations as counterclaims otherwise barred by its one-year statute of limitations. 15 U.S.C. §1640(e). *See generally* 3 *Moore's Federal Practice* ¶ 13.11 at 13-245 (2d. ed. 1980). Cases permitting a TILA-based counterclaim without regard to the statute of limitations are listed in *Plant* v. *Blazer Financial Services, Inc.*, 598 F.2d 1357, 1364 n.13 (5th Cir. 1979). This, combined with long term credit transactions, exposes creditors to liability in connection with all outstanding credit transactions.

mediately expose all creditors to liability and supply the incentive to litigate to very large numbers of persons who have suffered no harm whatsoever.

II. BY ATTEMPTING TO DEVISE A FEDERAL COMMON LAW OF SECURITY INTERESTS, THE COURT BELOW IMPROPERLY CREATED A DISCLOSURE REQUIREMENT NOT FOUND IN TILA, IN DIRECT CONTRAVENTION OF AUTHORITATIVE PRONOUNCEMENTS OF THE FEDERAL RESERVE BOARD

A. Neither The "Express Language" Of TILA Nor That Of The Implementing Regulation Requires The Disclosure Of The Disposition Of Unearned Insurance Premiums As A Security Interest

In order to provide meaningful and conspicuous credit cost disclosures, TILA identifies a handful of key consumer credit terms and requires their disclosure, including "security interest[s]."[16] Specifically, TILA requires only that a creditor provide a "description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit and a clear identification of the property to which the security interest relates."[17] In identical language, Regulation Z requires this disclosure,[18] and it generally defines "security interest" as "any interest in property which secures payment or performance of an obligation" and lists the types of interests disclosable as security interests.[19]

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[16] 15 U.S.C. §§1638(a)(10), 1639(a)(8).

[17] *Id.*

[18] 12 C.F.R. §226.8(b)(5).

[19] 12 C.F.R. §226.2(gg) defines "security interest" as follows:

> "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the

Neither TILA nor Regulation Z includes incidental interests in "unearned insurance premiums" in the definition of security interest.[20] The transaction in this case does involve collateral included in this definition, an automobile, and it was properly disclosed. It is beyond reasonable dispute that Congress intended the security interest disclosure to inform consumers of the central property at risk if they fail to meet their obligations — here, an automobile.[21]

Thus, applied literally, no "express language" in TILA or Regulation Z creates the disclosure requirement asserted by the Respondents, as required by *Ford Motor Credit Co.* v.

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sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

[20] Moreover, the regulatory definition does not include any similarly tangential, incidental interests. Included interests fall into three categories: (a) consensual security interests (*e.g.*, Uniform Commercial Code security interests, mortgages); (b) confessed liens; and (c) security interests arising by operation of law (*e.g.*, mechanic's liens). *Anthony* v. *Community Loan and Investment Co.*, 559 F.2d 1363, 1366, *reh. en banc denied*, 564 F.2d 416 (5th Cir. 1977). These security interests impose a lien upon, a risk to or a charge against the property that is the subject of the transaction. *Rounds* v. *Community National Bank in Monmouth*, 454 F.Supp. 883, 888 (S.D. Ill. 1978). Under the established rule of *ejusdem generis*, additional interests must be of the same nature as the items listed. An assignment of unearned insurance premiums for insurance on the collateral that secures the debt is not similar to these significant interests. This incidental interest bears no resemblance to the customary and usual meaning of "security interest."

[21] Recent Congressional commentary on the *existing* version of TILA supports this common sense interpretation. In describing the need for a clarification of the security interest disclosure requirement, the author of several simplification efforts, Senator J. Garn (R-Ut.), made clear that these modifications were being made *not* to change the law, but rather to correct misinterpretations of the law. Referring specifically to a court case that "required the creditor's right in property insurance proceeds and unearned property insurance premiums, to be disclosed as a 'security interest'," the Senator stated, "*Although as presently written the law does not require that result*, S. 108 [the Truth in Lending Simplification and Reform Act] should prevent such ludicrous interpretations. . . ." 125 *Cong. Rec.* S4990, 96th Cong., 1st Sess. (1979) (emphasis added).

Milhollin, 444 U.S. 555, 560 (1980) ("*Milhollin*"). Literal application is necessary to avoid the danger inherent in the "express language" test that courts will subvert the administrative interpretive process by, in each case, determining that an issue is "covered" by "express language." That potential — which created the substantive issue addressed in *Milhollin* when lower courts "found" the acceleration disclosure requirement *in* the law[22] — can be avoided *only* by a holding that TILA or Regulation Z must, by specific language, create a disclosure requirement. Only if a requirement is found in the exact words of TILA or Regulation Z should a court be allowed to avoid recourse to the extensive pattern of administrative interpretations provided by the Federal Reserve Board. The alternative is to return to the chaos that characterized the field prior to *Milhollin*[23] and would make that decision meaningless.

Having concluded that express language does not create the asserted requirement, the Court in *Milhollin* prescribed the appropriate analytical framework, the consideration of the "implicit character of the statutory scheme." 444 U.S. at 560. Petitioners' Brief carefully adheres to that framework and properly concludes there was no violation of TILA. Although in full agreement, *Amici* will not repeat the arguments advanced by Petitioners. *Amici* respectfully submit that the disclosures provided by Petitioners, reflecting an industry-wide practice, are consistent with the appropriate application of both the letter and spirit of TILA's disclosure requirements.

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[22] *St. Germain* v. *Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), the case relied on by the appellate court in *Milhollin*, decided that the required disclosure of the "right of acceleration" could be found in reading Regulation Z, a conclusion rejected by this Court. *Compare* 573 F.2d at 576 *with* 444 U.S. at 562.

[23] For a discussion of these problems, *see Brief Of The Consumer Bankers Association As Amicus Curiae, Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980) (No. 78-1487).

B. The Federal Reserve Board Concluded That State Law Determined What Constituted A "Security Interest" Under TILA. The District Court Held That, Applying Only State Law, There Was No Security Interest

The Court's decision in *Milhollin* points inescapably to the conclusion that the decision of the court below should be reversed. *Milhollin* recognized that the need for clarity and certainty in the highly technical area of consumer credit cost disclosures could be met only in the manner intended by Congress, through administrative pronouncements.

In implementing TILA, the Federal Reserve Board has devised a variety of interpretive devices to provide guidance to creditors. In this case, Unofficial Staff Interpretations, reflecting the Board's informed judgment on technical details, have provided that State law governs the issue as to whether there is a security interest to be disclosed under TILA.[24] The District Court in its initial decision found that no security interest existed under the applicable State law. Therefore, the court below improperly held Petitioners' failure to disclose that "security interest" to be a violation of TILA.

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[24] As discussed by the Petitioners, the Federal Reserve Board has clearly signaled a modified position on the duty to disclose and the desirability of disclosing an interest in unearned insurance premiums. *See* Official Staff Interpretation No. FC-0173 (Proposed), 45 *Fed. Reg.* 63295 (September 24, 1980). Apparently in response to contrary court decisions referenced in the Interpretation (which essentially ignored staff interpretations), Board staff has reexamined the most appropriate interpretation of the security interest disclosure requirement in view of TILA's credit shopping purpose. As reflected in the proposed Interpretation, it seems clear that the Board staff has concluded that disclosure would not further that purpose. Petitioners' Brief correctly concludes that the Board has modified its earlier view, now deciding that disclosure is not necessary. Due to the review of this issue by the Court, however, the Board has deferred temporarily final adoption of the Interpretation, indicating that it would be "inappropriate to take final action on the interpretation at this time." 45 *Fed. Reg.* 84074 (December 22, 1980). If the recent modification is not recognized, as discussed herein the Board's previous position similarly points to reversal of the decision below.

1. The Decision Below Is Contrary To This Court's Decision In Milhollin, *Which Recognized The Federal Reserve Board And Its Staff As The Authoritative Interpretive Source In Identifying TILA Disclosure Requirements*

In interpreting statutes, courts have consistently relied upon administrative pronouncements, particularly when, as here, the agency is construing its own regulation.[25] In *Milhollin*, the Court, recognizing the unique nature of TILA requirements, held that deference to the Federal Reserve Board "is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z." 444 U.S. at 565. Noting the highly technical and often nonsubstantive disputes under TILA and the need for expertise in determining what will actually enhance meaningful disclosure (as opposed to merely adding unimportant and confusing information),[26] the Court concluded that these close decisions should be left to the Federal Reserve Board and its staff. 444 U.S. at 568-69.

The conclusions reached by the Court in *Milhollin* are no less valid now than they were less than a year ago when that decision was rendered. Both creditors attempting to comply with TILA and consumers seeking comparable credit cost information must be able to look to a single set of consistent rules. Generally, the precise shape of the rule is far less important than that there be one specific, understandable rule, making TILA uniquely well suited to reliance on ad-

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[25] *See, e.g., Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co.* v. *Electrical Workers*, 367 U.S. 396, 408 (1961); and *Bowles* v. *Seminole Rock and Sand Co.*, 325 U.S. 410, 413-14 (1945).

[26] One of the most difficult issues under TILA is attempting to convey important credit information to consumers in a meaningful, usable way without overwhelming them with too much detail. As recognized by both Congress and this Court, disclosure of all or relatively unimportant information results in "information overload" preventing the effective communication of *any* information. *See* S. Rep. No. 96-73, 96th Cong., 1st Sess. 3 (1979). "*Meaningful* disclosure does not mean *more* disclosure." *Milhollin*, 444 U.S. at 568 (emphasis by the Court).

ministrative rulemaking, *Milhollin*, 444 U.S. at 565, 568-69, which is essential to provide uniform and comprehensive guidance to creditors attempting to discern and discharge TILA responsibilities.

The technical detail involved in meeting those responsibilities requires the use of various types of administrative tools, the first being Regulation Z.[27] "Even Regulation Z, however, cannot speak explicitly to every credit disclosure issue." *Milhollin*, 444 U.S. at 560. In light of the inability to cover all possible questions in the Regulation, Congress empowered the Federal Reserve Board and its staff to adopt interpretations. *Id.*, 444 U.S. at 566-67.

The Federal Reserve Board has determined that it may best provide interpretive assistance by issuing several different types of interpretations: Official Board Interpretations, Official Staff Interpretations and Unofficial Staff Interpretations (often referred to as "FRB Public Information Letters"). The Board has established criteria to determine the kind of interpretations to be issued in a specific case.[28] Internal Board decisions as to the type of interpretation[29] are based upon considerations of efficient administration and do not purport

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[27] *See Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973).

[28] Board Interpretations generally deal with policy matters. *See* 43 *Fed. Reg.* 18539, 18540 (May 1, 1978). The two types of Staff Interpretations are described in Regulation Z, and are differentiated on the basis of the type of response being sought and the time frame within which it is needed. *See* 12 C.F.R. §226.1(d).

[29] This determination may change or a more definitive response may be necessary. For example, when this case was accepted for Court review, the Federal Reserve Board had already started to provide a definitive Official Staff Interpretation dealing with the disclosure treatment for unearned insurance premiums. *See* Official Staff Interpretation No. FC-0173 (Proposed), 45 *Fed. Reg.* 63295 (September 24, 1980). Apparently, the Board staff felt initially that the "unearned insurance premiums" issue was not of sufficient importance to justify anything but a restatement of its general position to refer to State law to determine whether a "security interest" existed. As noted above, the Board has temporarily deferred further refinement of its position pending a decision in this case. *See* n.24 *supra*.

to assign differing or relative levels of interpretive value to one kind of interpretation over another. Rather, various types of interpretations have been provided due to the magnitude and variety of the inquiries involved — including the degree of technicality and the impact on existing or new policies.

The absence of a distinction in the interpretive value of Unofficial as opposed to Official Staff Interpretations is consistent with the need for definitive administrative interpretation of TILA. This was underscored in *Milhollin*, which made clear that the staff's expertise was to be followed in virtually every case. "Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive. . . ." *Milhollin*, 444 U.S. at 565. No distinction between Official or Unofficial Staff Interpretations was made in the Court's discussion of the substantive issue being addressed in *Milhollin*.[30] Indeed, there the Court looked to and relied upon a theory contained *not* in the single Official Staff Interpretation cited in that case, but rather in an Unofficial Staff Interpretation.[31]

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[30] As recognized in *Milhollin*, for the purpose of defense to civil liability a different stature is attributed to interpretations that are designated as "official." *See Milhollin*, 444 U.S. at 567 n.10; 15 U.S.C. §1640(f). However, this discussion is focused on the *interpretation* of the statutory requirements, and *not* a *question of defense* when it has been established that a violation has occurred. That critical point was emphasized in *Milhollin*.

> The enactment and expansion of §1640(f) *has significance beyond the express creation of a good-faith immunity*. That statutory provision signals an unmistakable congressional decision *to treat administrative rulemaking and interpretation under TILA as authoritative*. Moreover, language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation. *Milhollin*, 444 U.S. at 567-68 (emphasis added; footnotes omitted).

[31] *Milhollin* involved disclosure of the creditor's right of acceleration. Two theories were advanced in favor of creating a duty to disclose it: that disclosure was mandated by a portion of Regulation Z dealing with default and similar charges, 12 C.F.R. §226.8(b)(4), and that it was covered by a provision dealing with prepayment rebate disclosures, 12 C.F.R. §226.8(b)(7). The only Official Staff Interpretation involved dealt with the responsibility to disclose under §226.8(b)(4). Thus, the application of that

Accordingly, both on the basis of sound administration and implementation of TILA and this Court's pronouncements, not followed by the court below and expressly rejected by at least one other court,[32] the authoritative determinations of the Federal Reserve Board and its staff should be followed, including those reflected in Unofficial Staff Interpretations.

2. In Unofficial Staff Interpretations The Federal Reserve Board Ruled That State Law Governs Whether A Security Interest Exists For TILA Disclosure Purposes

The pronouncements of the Federal Reserve Board, including one addressing the specific issue before the Court, have held that State law determines whether any right, interest or contract provision constitutes a "security interest" for the purpose of TILA disclosures.[33] This interpretation is totally

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letter alone would have defeated only one of the two arguments in favor of disclosure, both of which ultimately were rejected by the Court. Moreover, the theory adopted by the Court and discussed in the concurring opinion issued by Mr. Justice Blackmun and joined by The Chief Justice, was that the creditor's "policy or practice," rather than the technical terms of the contract, were to be properly reflected in the disclosures. The former position — adopted by the Court — cannot be found either literally or conceptually within the *Official* Staff Interpretation involved. Rather, that position evolved from Unofficial Staff Interpretation No. 1208, referred to and quoted by the Court. *Milhollin*, 444 U.S. at 563-65 n.8. Therefore, *Milhollin* was based, at least in large part, on administrative interpretations as reflected in *Unofficial* Staff Interpretations.

[32] *See Souife* v. *First National Bank of Commerce*, 628 F.2d 480, 483 (5th Cir. 1980). The Fifth Circuit has deferred further consideration of a petition seeking rehearing *en banc*, pending a decision in this case. Unpublished Order signed by Anderson, C.J. (December 5, 1980).

[33] Several Federal Reserve Board staff letters defer to State law in determining the existence of a security interest and its disclosure. *See* FRB Public Information Letter No. 114, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 30,159 (September 10, 1969) (whether an agreement not to encumber or transfer property is a security interest depends on State law); FRB Public Information Letter No. 829, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,151 (August 22, 1974) (disclosure must accurately reflect the type of security interest acquired under State law);

appropriate, since State law governs all other substantive aspects of consumer credit transactions.[34]

That view first became clear on September 10, 1969, when the Board through its staff indicated that whether specific interests constituted a "security interest" "depends on State law."[35] Following that and a number of similar

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FRB Public Information Letter No. 1053, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,393 (May 28, 1976) (disclosure must accurately state the scope of a security interest under State law); FRB Public Information Letter No. 1080, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,420 (July 14, 1976) (appropriate description of security interest depends upon how it is characterized by applicable State law); FRB Public Information Letter No. 1125, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,475 (November 2, 1976) (disclosure must accurately describe creditor's rights under State law); FRB Public Information Letter No. 1145, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,520 (January 11, 1977) (look to rights acquired under State law); FRB Public Information Letter No. 1151, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,531 (January 31, 1977) (Regulation Z leaves to State law the definition of "after acquired" property); FRB Public Information Letter No. 1227, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,666 (July 29, 1977) (whether a confession clause is a security interest depends upon its effect under State law); FRB Public Information Letter No. 1263, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,736 (November 23, 1977) (whether the assignment of returned and unearned insurance premiums and the contractual right to insurance proceeds are security interests is a matter of State law).

[34] With limited exceptions, TILA mandates disclosure and not substantive provisions that are and have always been established by the States. *See* 1 *Cons. Cred. Guide (CCH)* ¶ 1005 at 3012. As with other contract terms, TILA does not alter State law regarding security interests; it merely requires their disclosure. Since a consumer will shop for credit among creditors who will virtually always be located in the same geographic area, and most certainly will be applying the same State law, there is no lack of uniformity in the information received by the consumer. Moreover, insofar as different information is disclosed, this results *not* from differences in the disclosure requirement, but rather from the lack of uniformity in State law prescribing contract rights, including those involving security interests. Uniform Federal disclosure requirements do not create those State law differences, they merely reflect them.

[35] FRB Public Information Letter No. 114, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 30,159 (September 30, 1969).

opinions, the Board staff dealt with precisely the issue before the Court:

> What constitutes adequate identification of the *type* of security interest acquired by the creditor depends upon how relevant State law would describe the security interest. *Note that a more fundamental matter in these circumstances may be to determine whether a security interest exists at all and, if so, to identify the property subject to such interest.* . . . [A]ssignment of returned and unearned premiums *may* transfer to the creditor such an interest. However, staff believes *these questions would be better addressed as a matter of State law.* FRB Public Information Letter No. 1263, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,736 (November 23, 1977) (all but initial emphasis added).

Thus, the Federal Reserve Board concluded that *State* law is to determine whether a security interest exists.[16]

Problems have arisen when some Federal courts attempted to devise a form of Federal common law of security in-

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[16] The court below incorrectly suggested that another staff letter on an "analogous" issue supported its conclusion that a security interest is involved here. 617 F.2d at 1286. That letter, however, appears to deal with a significantly different set of circumstances, involving a credit transaction undertaken for the express purpose of acquiring insurance. A letter issued July 22, 1970 (FRB Public Information Letter No. 377, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 30,555 (July 22, 1970)), indicated that if a customer is purchasing a policy "with the proceeds of his loan" and the *ownership* of the policy is to be retained by the creditor, the creditor's ownership should be disclosed. The letter apparently deals with a consumer obtaining a loan to purchase an insurance policy, with the policy being used as the only collateral. In that case, the object of the credit transaction that is being looked to as collateral — the ownership of an insurance policy — would be disclosed, just as in this case the automobile involved was disclosed. In addition, the letter states that the appropriate disclosure involved "ownership" of the policy by the creditor, a factor not present in the instant case. In any event, this letter is the only expression contrary to the series of letters that had directed creditors to look to State law. Insofar as it may be read to be inconsistent, it has been modified by subsequent staff interpretations, including those described above. *See* n.33 *supra*.

terests, at least for purposes of TILA disclosure.[37] Beginning with a single case that dealt with the assignment of a "homestead and exemption" provided under State law, several courts purported to create a new rule — apparently used only for credit disclosures — that any "valuable economic right" must be disclosed as a security interest, regardless of the application of State law.[38]

That determination to formulate a security interest test using Federal law — contrary to the pronouncements of the Federal Reserve Board staff — produced *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979) ("*Edmondson*"). That case was cited as the foundation of the final decision by the District Court in this case[39] and the basis of the decision now before the Court for review.[40] *Edmondson*, despite clear Federal Reserve Board interpretations, prefaced its examination of the interest involved under Federal law, which it held to be controlling, by declaring the absence of any need even to look at State law:

> Fortunately we need not tarry over the complexities of Georgia's commercial law. . . . 577 F.2d at 293.

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[37] The same effort in another area was recently turned aside by this Court in *Butner* v. *United States*, 440 U.S. 48 (1979). Under the Federal Bankruptcy Act, the Court required the courts to look to State law to define and determine whether the creditor acquired a "security interest": "Property interests are created and defined by state law." 440 U.S. at 55. The rationale of that case applies with equal force to the issue of Federally mandated disclosure of the provisions of State substantive law. *See* n.34 *supra*.

[38] *Elzea* v. *National Bank of Georgia*, 570 F.2d 1248 (5th Cir. 1978). That case held that characterizations of State law "are not determinative of whether a creditor holds a security interest under Regulation Z's definition." 570 F.2d at 1249-50.

[39] *See* J.A. 33. The District Court also cited *Shanks* v. *Greenbriar Dodge, Inc.*, 577 F.2d 296 (5th Cir. 1978), a companion case to *Edmondson* decided on the same day, which merely found facts "virtually identical" to *Edmondson* and summarily followed it. *Id.* at 297-98.

[40] 617 F.2d at 1283-85.

The decision to devise a Federal law of security interests similarly undergirds the holding of the Court of Appeals for the Eighth Circuit in *Murphy* v. *Ford Motor Credit Co.*, 629 F.2d 556 (8th Cir. 1980).

> While we recognize that state law may be a factor in determining whether a security interest has been created in a given situation, an interest may, nevertheless, be a security interest for purposes of TILA even though it is not an enforceable security interest under state commercial law. 629 F.2d at 559.[41]

In short, the cases that have actually dealt with the issue of whether any interest in unearned insurance premiums is a "security interest"[42] are based solely on a premise in direct conflict with the Federal Reserve Board's determination that these matters should be resolved under State, not Federal, law. In view of the Congressional decision, recognized in *Milhollin*, that administrative interpretation of TILA is to be decisive, State law controls "security interest" characterizations under TILA.

3. The District Court Found That, Under State Law, No Security Interest Existed. A Fortiori, *No Disclosure Is Required*

The District Court in its initial decision found that under the applicable State law the interest involved here *was not a*

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[41] The court below made a similar statement, 617 F.2d at 1284, citing its decision in *Bulger* v. *Thorp Credit Inc.*, 609 F.2d 1255 (7th Cir. 1979). Neither court provided any explanation as to how disclosing this information to a consumer would be at all helpful — for credit shopping or otherwise — if there is no "security interest" under State contract law.

[42] Although often cited as the genesis of the case law in this area, *Gennuso* v. *Commercial Bank & Trust Co.*, 566 F.2d 437 (3rd Cir. 1977), did not involve a dispute as to the existence of a security interest. The only issue involved there was the appropriate disclosure of a security interest *that was conceded to exist*, apparently under applicable Pennsylvania law. *See* 425 F.Supp. 461, 467 n.11 (W.D. Pa. 1976). There, the *creditor stipulated* that the interest involved under applicable law *was a security interest*. The issue addressed in *Edmondson*, *Murphy* and in the court below simply was not before the court in *Gennuso*.

security interest.[43] That finding was undisturbed by the trial court's subsequent decisions and the decision of the Seventh Circuit Court of Appeals.[44]

Accordingly, following Federal Reserve Board interpretations, the policies recognized in *Milhollin*, and the District Court's determination as to the proper characterization under State law, no security interest disclosure is required with respect to unearned insurance premiums for the simple reason that there is no security interest.

III. IF THE PRACTICE FOLLOWED BY PETITIONERS IS FOUND TO BE A VIOLATION OF TILA, THE DISCLOSURE REQUIREMENT INVOLVED SHOULD BE PROSPECTIVE ONLY

A. The Analysis Of *Chevron* By The Court Below Was Incorrect

As outlined above, *Amici* submit that the court below is incorrect on the merits. But assuming the soundness of its decision, it should be given only prospective effect. For the reasons set forth in Petitioners' Brief, the factors identified in *Chevron Oil Co.*, v. *Huson*, 404 U.S. 97, 106-07 (1971) ("*Chevron*"), dictate that any holding that disclosure is required should be given prospective application only. Moreover, the court below incorrectly took the view that all three *Chevron* factors are essential to a prospective judicial

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[43] J.A. 9. Viewing the clause under Illinois law in the context of "the contract or in the purchase and sale of automobiles," and citing an Illinois statute dealing with insurance premium refunds, the court concluded it was "rather clear that unearned insurance premiums do not constitute a security interest in the automobile." *Id.* at 12.

[44] After its first decision, the District Court issued two other opinions. J.A. 19 and 33. In the first, the court made clear that *Edmondson*, and its companion case, *Shanks* v. *Greenbriar Dodge, Inc.*, 577 F.2d 296 (5th Cir. 1978), both of which rejected the applicability of State law, were the basis for the reversal of its initial decision. No further reference to State law was made by the District Court and the court below did not address the issue, since, in following *Edmondson*, it found State law characterizations "not determinative." 617 F.2d at 1284.

ruling. 617 F.2d at 1289. In fact, as elaborated below, the purpose of the doctrine announced is the touchstone of analysis, and one or more of the factors may be decisive. For example, under proper circumstances, a new doctrine that involves *either* inequity *or* the absence of any further legitimate purpose can preclude retrospective effect.

The Seventh Circuit held that its view of the assignment of unearned premiums as a "security interest" was "foreseeable." From this the court below reasons that Petitioners did not satisfy the standards set forth in *Chevron*. 617 F.2d at 1289. The position urged by Respondents and assumed by the Seventh Circuit is simply unrealistic. It is premised upon three district court opinions, two in the Northern District of Georgia (reaching opposite results)[45] and one in the Western District of Pennsylvania (in which the question of the existence of a security interest was not even in issue).[46] These cases, as outlined in Petitioners' Brief, are not controlling and were in conflict even at that time. Indeed, the District Court in this case initially agreed with Petitioners' views on the disclosure issue before reversing itself in light of the subsequent Fifth Circuit decision in *Edmondson*.

Even if the three district court cases cited by the court below had been consistent and on point, however, *Amici* would respectfully submit that they should not be given the effect of altering disclosure requirements for every creditor in the United States. TILA litigation arises in thousands of contract actions between private parties in a multitude of State courts and in all 516 Federal district courts. Given their volume, diversity and relative obscurity, trial court decisions simply do not notify the universe of a changed requirement. More important, they should not trigger the expensive, cumbersome process of implementing a change.

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[45] *Edmondson* v. *Allen-Russell Ford, Inc.*, Civ. No. C75-940A (N.D. Ga., April 29, 1976), *aff'd*, 577 F.2d 291 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979), and *Shanks* v. *Greenbriar Dodge, Inc.*, Civ. No. C75-1154A (N.D. Ga. 1976), *rev'd*, 577 F.2d 296 (5th Cir. 1978).

[46] *See Gennuso* v. *Commercial Bank & Trust Co.*, 425 F.Supp. 461 (W.D. Pa. 1976), *rev'd*, 566 F.2d 437 (3rd Cir. 1977); n.42 *supra*.

The Court should consider the consequences of the Seventh Circuit's position. If a creditor must react to any court decision anywhere in the nation from any judge, no matter how remote the court may be geographically from the creditor's business, and regardless of whether the court's opinion is published or disseminated, then creditors are faced with a truly impossible task.[47] Given the magnitude of TILA litigation pending in the courts, creditors will simply be unable to achieve the certainty and uniformity TILA was designed to foster.

B. Under Established Principles Of Judicial Discretion Extending Beyond *Chevron*, A Decision Requiring Disclosure Should Be Prospective Only

A more fundamental basis for reversal of the court below on this issue is the fact that *Chevron* dealt with a conventional lawsuit involving — as do most lawsuits — the question who is to bear a loss that has been suffered. As the Seventh Circuit observed, the *Chevron* considerations are controlling in determining such a case. But the case at bar, like most TILA cases, does not deal with deciding who will bear an existing loss. Rather, it presents the question as to whether a loss is to be *created*. This is true because TILA awards its statutory penalty plus attorneys' fees to consumers involved in a credit transaction that does not comply with the technicalities of TILA, regardless of whether the absence of technical compliance affected the transaction or caused any

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[47] The law of prospective application of appellate decisions is not that strict. For example, in *Kacher* v. *Pittsburgh National Bank*, 545 F.2d 842 (3rd Cir. 1976), a debtor whose collateral on a loan had been repossessed and sold by a creditor pursuant to the Pennsylvania replevin statute sought to recover punitive and compensatory damages on the grounds that the procedure followed was unconstitutional under *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The court refused to apply *Fuentes* retrospectively, even though the debtor persuasively argued that the *Fuentes* decision was clearly foreshadowed by the decisions in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

injury or damage. This fact argues persuasively for limiting novel disclosure requirements to prospective effect.

1. A Retrospective Disclosure Requirement Would Not Promote TILA Purposes As Identified By Congress

The policy behind the TILA penalty mechanism is essentially deterrent or prophylactic in nature. As such, the question whether novel TILA disclosure requirements should be given standard retrospective effect is governed by the line of cases that deals specifically with rules of law that are prophylatic in nature. There is ample precedent for the proposition that judicial developments in these areas are to be given only prospective effect.

Notable among these cases is *United States* v. *Peltier*, 422 U.S. 531 (1975), where the Court declined to apply the rule announced in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973),[48] even though *Peltier* was pending on appeal when the *Almeida-Sanchez* decision was released. The Court expressly focused on "the purposes served by the exclusionary rule." 422 U.S. at 538. Because the purpose of the rule was to deter law enforcement personnel from violating the constitutional rights of others, retrospective application would not further that purpose. To the same effect is *Linkletter* v. *Walker*, 381 U.S. 618 (1965), which declined to give retrospective application to *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which for the first time held State law enforcement officers subject to the exclusionary rule with respect to unreasonable searches and seizures.

In cases involving the application of constitutional principles to criminal trials, the Court has consistently focused on the purpose of the recently announced rule and its impact on the reliability of a conviction. The Court has retrospectively applied new rules of criminal procedure "fashioned to correct serious flaws in the fact-finding process at trial." *Stovall* v.

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[48] *Almeida-Sanchez* held that a warrantless search of an automobile conducted 25 miles from the border with Mexico without probable cause violated the Fourth Amendment.

Denno, 388 U.S. 293, 298 (1967). Thus, for example, the rule announced in *Bruton* v. *United States*, 391 U.S. 123 (1968) (which held that an admission by one defendant in a joint trial which implicated a co-defendant violated the co-defendant's right of cross-examination) was applied retrospectively in *Roberts* v. *Russell*, 392 U.S. 293, *reh. denied*, 393 U.S. 899 (1968), because the rule was designed to eliminate a practice in criminal trials that was considered to affect adversely the reliability of convictions. Cases involving the exclusionary rule, on the other hand, do not affect the reliability of convictions, because illegally obtained evidence does not lose its probative value by the manner in which it is acquired.

This distinction illustrates the inquiry necessary to decide whether to limit a decision announcing a new rule to prospective effect. The decision is not one that is guided by an application of sterile and inflexible standards from *Chevron* or anywhere else. Rather it is the product of a case-by-case consideration of the purposes to be served by the new rule and a careful weighing of the equities involved. And in dealing with prophylactic rules, at bottom, "[t]he purpose of the new rule is the bench mark for its application prospectively or retrospectively." *United States* v. *Miller*, 492 F.2d 37, 41 (5th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975).

The doctrine that the purpose of the new rule may itself dictate prospective application has been developed principally in criminal cases. But this simply reflects the fact that a typical private civil suit — such as *Chevron* itself — involves a rule of law whose purpose is corrective, not prophylactic. Otherwise stated, most civil litigation involves substantive rules designed to remedy wrongs and redress injuries. TILA violations, at least those of the type involved in the case at bar, are wholly different and more similar to the exclusionary rules of criminal procedure.

The fundamental goal of TILA is to insure disclosure of credit terms in a manner that will enable the consumer to

make comparisons and enter transactions knowledgably.[49] This can only happen as to transactions that have not yet occurred. Prospective relief thus serves this purpose fully as well as does retrospective relief.[50] A second purpose, which is a corollary of the first, is to deter violations of TILA by creditors. This is accomplished by the provisions authorizing penalties in private lawsuits, thus encouraging borrowers to act as "private attorneys general," and by provisions for the recovery of attorneys' fees.

TILA's purpose to deter violations was not designed to give a windfall to borrowers. Nothing could be further from the intent of Congress. "The penalty provisions of the Act were designed as an enforcement mechanism, not as a source of windfall gains for obligors." *Mirabal* v. *General Motors Acceptance Corp.*, 537 F.2d 871, 880 (7th Cir. 1976). To avoid such a result, and promote TILA's goals, if the decision below is affirmed it should be applied prospectively. To be sure, to comport with TILA's encouragement of private attorneys general, the Respondents should be permitted to benefit from any change in the law they produce. But others should not be permitted to recover a civil penalty unless they are able to demonstrate actual harm, in which case redress is provided under a different provision of TILA.[51]

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[49] "It is the purpose of [TILA] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. §1601. The Seventh Circuit recognized that the requirement announced there could not seriously be suggested to further the underlying purposes of TILA. 617 F.2d at 1293 (Cudahy, J., concurring). Thus, there is no question that application of the new rule retrospectively would *not* further the fundamental purposes of TILA.

[50] *Travis* v. *Trust Company Bank*, 621 F.2d 148 (5th Cir. 1980), and *Brown* v. *Termplan, Inc.*, 459 F.Supp. 160 (N.D. Ga. 1978), both cited by Respondents, hold that TILA's purposes are served by retrospective application, but neither case offers an adequate explanation of how retrospectivity deters violations of TILA by creditors.

[51] 15 U.S.C. §1640(a)(1).

2. Retrospective Application Of A Disclosure Requirement Has A Punitive Effect On Creditors And Gives A Windfall To Litigating Debtors

The basic equities of the situation also favor prospective application of new developments in TILA disclosure requirements. As noted earlier, this case involves a consumer credit transaction like literally thousands of other transactions entered into daily across the country and enormous numbers of these transactions would be affected by the decision below, since widely distributed, preprinted forms are used.[52] In addition, the adoption of a national rule requiring disclosure in this case would be felt by creditors in circuits that have not considered this issue and in at least one circuit that has announced a different rule.[53]

It is obviously impossible and surely not in the national interest that consumer credit grind to a standstill every time a court discovers a new TILA requirement. As a result, if new decisions are not applied prospectively, any decision that disclosure is required under TILA necessarily has a substantial impact on a very large number of contracts that were entered in reliance on a different view of the law.[54] Further, if such a

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[52] To the extent that consumers and their attorneys are unaware of the technical requirement asserted here, a decision by this Court not limited to prospective application affirming the decision below will instantly alert them to it. A highly visible retrospective determination raises the spector that it will set off a series of individual and class actions that could give rise to summary judgments against virtually every creditor in the country.

[53] *See James* v. *Ford Motor Credit Co., supra*, n.14.

[54] Reliance on the generally perceived state of the law has been repeatedly recognized as a basis for denying retrospective effect. For example, in *Bendix Corporation* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973), a defendant to a patent infringement suit counterclaimed for alleged antitrust violations. The defendant's counterclaim was strengthened by the decision in *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969), during the pendency of the lawsuit. Because *Lear* expressly overruled the decision of *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 399 U.S. 827 (1950), the court found that the new rule should not be applied to the case before it. The court concluded

decision is given retrospective effect, it has the potential for the imposition of severe penal sanctions on creditors, who are subject to vast numbers of private actions or to class actions.

Indeed, although at first the analogy may seem overblown, there is significant similarity between the effect of retrospective application of decisional TILA requirements and the statutory scheme held unconstitutional in *Ex parte Young*, 209 U.S. 123 (1908), where the only means by which a State statute could be challenged was in the defense of an enforcement proceeding, during the pendency of which enormous penalties continued to accrue. In each case the creditor under TILA or the challenger under *Ex parte Young* is remitted to a choice either (a) to accede to the position urged by his opponents or (b) to litigate and face the risk of truly staggering penalties if unsuccessful at the end of the day. If not constitutionally necessary it is at least good policy, and judicial discretion in favor of prospective application of new requirements is an appropriate means of preserving the right of creditors to present their positions to the courts without intimidation.

3. A Minimum Ninety-Day Delay In The Effect Of A Final Appellate Decision Reflecting A New Disclosure Requirement Is Both Necessary And Appropriate

If the Court decides that disclosure should be required, but that its decision should be given prospective effect, the further question of when the decision should take effect must be addressed. Because creditors deal with preprinted forms, and any change in the law necessitates a careful revision of those forms followed by printing, distribution and training in the use of the forms, *Amici* suggest that a disclosure should

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that an application of the law of *Lear* would not further the purpose of the new rule, but would simply penalize the plaintiff for its reliance on prior law. *See also Simpson* v. *Union Oil Company*, 377 U.S. 13, 24-25 (1964) (holding that resale price maintenance through a scheme of coercive consignment was illegal under the antitrust laws), and *Lyons* v. *Westinghouse Electric Corporation*, 235 F.Supp. 526, 537 (S.D. N.Y. 1964) (denying retrospective effect to *Simpson*).

be limited in effect to transactions entered beginning at least 90 days from the announcement of the decision (except, of course, for pending cases that raise the same alleged violation). This is the period selected in *McDaniel* v. *Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978), a decision that also addressed a change in TILA disclosure requirements.[55]

In addition, the Court should consider the question of the point in the judicial process appropriate for the initiation of a waiting period for prospective application of a decision.[56] District courts are inappropriate, because their decisions are frequently not published or widely disseminated and generally lack statewide application. Rather, the point from which a prospective rule should begin to run is the finality of a decision of a United States Court of Appeals, unless review by this Court is sought within the statutorily prescribed 90-day period. This mechanism will fully preserve the incentive for consumers to assert their contentions, but creditors engaged in good faith litigation to determine unclear questions of TILA requirements would not be faced with the prospect of accrual of enormous liability while they are still engaged in litigation to determine their rights.

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[55] Congress has recognized both the need for limiting the frequency of changes in TILA requirements and the necessity of adequate lead time within which to implement the change. Recent TILA amendments generally limit regulatory disclosure changes to one time a year (October 1) and establish a mandatory lead time of not less than *six months*. *See* Section 605 of the Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, Title VI, §605, 94 Stat. 168 (amending 15 U.S.C. §1604); S. Rep. No. 96-73, 96th Cong., 1st Sess. 12-13 (1979).

[56] Presumably, if during judicial review the Federal Reserve Board or its staff issues a relevant interpretation, it will control both the resolution of the issue involved and the effective date of the disclosure requirement it imposes or relieves. Moreover, *Amici* respectfully submit that it will be exceedingly difficult as a practical matter for the tens of thousands of creditors all over the country to identify, let alone implement, technical disclosure duties imposed on the basis of one fact situation even if the change is limited to decisions by appellate courts. It seems highly unlikely that new TILA rules, in view of the need for comprehensive rules reflecting the diverse credit market, will become universally applied until they are the subject of Federal Reserve Board action.

CONCLUSION

For all of the reasons stated above, the Court should reverse the decision below.

Respectfully submitted,

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